REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 291 OF 2015

GLADWELL OTIENO...1ST PLAINTIFF

(Suing on her own behalf and as the Administrator of the

estate of the Late **Virginia Wambui Otieno**)

ROSALYN W OTIENO..2ND PLAINTIFF

(Suing as the administrator of the estate of the late **Virginia Wambui Otieno**)

WAYAKI KUMALE FRANCESCO OTIENO ....3RD PLAINTIFF

VERSUS

THE STANDARD GROUP LIMITED ....1ST DEFENDANT

HUDSON GUMBIHI...2ND DEFENDANT

AFRICA CENTRE FOR OPEN

GOVERNANCE (AFRICOG)..................................INTENDED INTERESTED PARTY

RULING

1. The application dated 16th May, 2017 seeks orders that the Applicant, Africa Centre for Open Governance (AfriCOG) be enjoined to the present proceedings as an interested party.

2. It is stated in the affidavit in support that 1st and 2nd Defendants made various publications in their newspaper, **The Nairobian** and associated the Applicant with the defamatory publication which is the subject of the suit herein. It is further stated that the Applicant was adversely mentioned in the said publication and that it's reputation is at stake and that therefore it would be in the interest of Justice to enjoin it in the suit herein to ventilate it's claim and adduce evidence.

3. The application is opposed the 1st and 2nd Respondent file the grounds of opposition dated 5th June, 2017 which state as follows:

> **"1. That the mere mention of the intended Interested Party's name does not entitle it to be joined as an interested party to the proceedings as it must have sought for a relief in the matter. The application is mischievously intended to delay the hearing of the suit herein.**
>
> **2. That the intended Interest Party is time-barred by dint of Section 4(2) of the Limitation of Actions Act, Cap 22 of the Laws of Kenya. The Applicant is circumventing the laid down procedure by sneaking in a fresh cause of action to an already existing suit.**
>
> **3. That defamation proceedings are personal in nature and that third parties cannot be admitted purportedly to 'effectually determine issues'. The Applicant is such third party and thus a stranger to the existing suit.**
>
> **4. That absolutely no grounds have been cited in support of the Application and the facts deposed to in the supporting Affidavit are not sufficient to form *substrata* on which the orders sought can be granted.**
>
> **5. That the Applicant has not demonstrated what it seeks to put or add in the pleadings already on record. The intended Applicant should have attached a draft necessary pleading so that the argument on the application is done with the knowledge of issues before the court.**
>
> **6. That it is a requirement that a party who intends to be joined to existing legal proceedings ought to show that he has "an identifiable stake or legal interest in the proceedings before the court". The Applicant has failed in this necessary requirement.**
>
> **7. That the application is incurably defective for want of form and substance, that the same is an abuse of the court process, frivolous, vexatious and merely intended to embarrass the Defendants.**
>
> **8. That it is just and in the interest of fairness and justice that the Applicant's Application dated 16th May, 2017 be dismissed with costs to the Defendants."**

4. The application was canvassed by way of written submissions. The Plaintiffs are not opposed to the application. The Applicant filed it's written submissions and supplementary submissions. The Defendants also filed their written submissions. I have considered the said submissions and the authorities relied on.

5. The Plaintiffs suit is based on the tort of defamation. The Applicant has annexed to the affidavit in support copies of the alleged defamatory publications. The said publications mention the 1st Plaintiff as a founding Executive Director of the Applicant, Africa Centre for Open Governance (AfriCOG). The impugned articles are said to have been published in **The Nairobian** edition of August 29th to September 4th, 2014 and repeated and widely re-published on electronic media. A print out of the 29th August, 2014 publication in the **breakingnews.wordpress.com** was also exhibited.

6. I will first turn to the law in respect of an Interested Party. **The Constitution of Kenya (protection of Rights and Fundamental Freedoms Practice and Procedure Rules** [the Mutunga Rules] at Rule 2 defines an interested party as follows;

> **"....a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court, but is not a party to the proceedings or may not be directly involved in the litigation."**

7. The Supreme Court in the case of **Francis Karioki Muruatetu & another v Republic & 5 others [2016] eKLR** espoused the elements applicable where a party seeks to be enjoined in proceedings as an interested party thus:

"One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.

iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court."

8. In case of **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2014] eKLR** it was held as follows:

"[18] Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause *ab initio*. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause."

9. From the aforegoing decisions, it is clear that for the court to exercise it's discretion in favour of the Applicant, the following should be proved;

(a) That the Applicant has an identifiable stake or legal interest proximate to these proceedings.

(b) Demonstrate the prejudice to be suffered if not enjoined as a party herein.

(c) Annex a draft pleading of his intended case.

(d) The said draft pleading is not a mere replication of what other parties have presented to the court.

10. In the case at hand, what is stated in the publications in question is that the 1st Plaintiff, Gladwell Otieno is the founding Executive Director of the Applicant (AfriCOG). The rest of the article is about the alleged defilement which is the subject of the suit herein. The details of the alleged defilement do not touch on the Applicant in any way. The Applicant's affidavit in support of the application has not pointed out how it has been adversely mentioned in the said publication which involves a matter of a very personal nature between the persons mentioned therein. Mention of the 1st Plaintiff being a founding Executive Director of the Applicant appears remote and is not proximate to the issue of defilement. There is no affidavit evidence or draft pleading to assist this court to discern the Applicant's identifiable stake or legal interest herein or what prejudice the Applicant will suffer if not enjoined in the proceedings.

11. The Defendants have raised the issue whether the application has been caught up by Section 4(2) of the Limitation of Actions Act Cap 22 Laws of Kenya, which provides for suits based on libel or slander be brought within 12 months. The material before court reflects that publication was on 29th August, 2014 and 29th August to 4th September, 2014. This application was filed on 16th May, 2017, more than two years later. It has not been demonstrated how the publications in question were repeated and re-published in electronic media. The publication in question is reflected in the annextures as published both in the print media and electronic media on 29th August to 4th September, 2014.

12. The facts of this case can therefore be distinguished from the persuasive case of **Lomah Jebiwott Kiplagat & another v Isaack Omulo & 2 others [2016] eKLR** where the publications complained of were made on 29th September and 18th October 2012 then republished in the website on 10th September, 2015 thereby opening the gateway for the doctrine of re-publication and resetting to come in.

13. In the case of **James Ochieng Oduor T/a Ochieng Oduor & Co Advocates v Richard Kuloba [2008] eKLR** the Court of Appeal held that in special and peculiar circumstances the amendment of the plaint can be allowed notwithstanding the effect will be to defeat the defence of limitation. The Court of Appeal stated as follows:

> **"It is quite clear from decided cases that a trial court has power to allow amendments of a plaint disclosing no cause of action (see Motokov v Auto Garage Limited and Another [1971] EA 353) In special circumstances amendment of a plaint may be allowed notwithstanding that the effect will be to defeat a defence of limitation (Barclays Bank D.C.O v Sharmsudin (1973) EA 451). However, such amendments can only be allowed where peculiar circumstances are present."**

14. In the case at hand, to enjoin the Applicant herein outside the one year provided by the law will amount to defeating the defence of limitation. No peculiar circumstances have been shown to exist.

15. With the foregoing, I find no merits in the application and dismiss the same with costs.

Dated, signed and delivered at Nairobi this 22nd day of Nov., 2017

B. THURANIRA JADEN

JUDGE